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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LINO CONCHA, Defendant and Appellant.	F073738 (Super. Ct. No. LF010767A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman, II, Judge.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Robert Gezi, Deputy Attorneys General, for Plaintiff and Respondent.

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Based on acts perpetrated against H.H., a daughter of his partner, M.C., defendant Lino Concha was found guilty of one count of sexual intercourse or sodomy with a child 10 years old or younger and one count of continuous sexual abuse of a child. The trial court imposed a sentence of 25 years to life on the conviction of sexual intercourse or sodomy with a child 10 years old or younger. It imposed and stayed a sentence of 16 years on the conviction of continuous sexual abuse of a child.

As a matter of law, a defendant cannot stand convicted of both continuous sexual abuse of a child and one of the acts of abuse that took place during the period of the continuous abuse, as the sexual intercourse or sodomy did here. (Pen. Code, § 288.5, subd. (c); *People v. Johnson* (2002) 28 Cal.4th 240, 248.) The convictions on the two counts are thus legally incompatible with each other, and the resulting sentence is unauthorized.

We reverse the count carrying the lesser sentence (the continuous abuse count). We find no other reversible error and affirm the balance of the judgment.

FACTS AND PROCEDURAL HISTORY

M.C. reported Concha's abuse of H.H. to police on July 19, 2015. After an investigation, the district attorney filed an information charging Concha with four counts: (1) sexual intercourse or sodomy with a Jane Doe born in 2009, a child 10 years old or younger (Pen. Code, § 288.7, subd. (a)[1]), between January 18, 2013, and July 18, 2015; (2) a second violation of section 288.7, subdivision (a), against the same victim during the same time period; (3) oral copulation or sexual penetration of the same victim, a child 10 years old or younger (§ 288.7, subd. (b)), during the same time period; and (4) continuous sexual abuse of a child under age 14 (§ 288.5, subd. (a)), against the same victim during the same time period. Count 2 was dismissed at the request of the prosecution at the close of evidence.

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1 Subsequent statutory references are to the Penal Code unless otherwise noted.

At trial, the prosecution presented evidence of what happened from the points of view of several individuals: Concha, H.H., H.H.'s younger sister K.H., and M.C. We will divide our discussion of the evidence accordingly.

A. Concha's Statements

When M.C. went to a sheriff's department substation on July 19, 2015, to report the abuse, she was asked to make a pretext call to Concha. During the call, M.C. asked Concha if he had had sex with H.H. (according to her trial testimony), and he said yes. When asked why he did it, he said it was because M.C. had not wanted to have sex with him.

Sheriff's deputies interviewed Concha at the substation on September 17, 2015. A deputy testified about this interview and a transcript was admitted into evidence. In the interview, Concha stated that he and M.C. had three children together, ages one, two, and three, and that M.C. had two daughters by another father: H.H., age six, and K.H., age five. In recent years, the family had lived in two different houses.

Unprompted, Concha began telling the deputies about the most recent incident, the one at the second house that led to his being reported—"when I did that with the girl," as he put it. The deputies began directing their questions to this incident. Concha told them he had been drinking all day and was very drunk. Some friends were at the house using methamphetamine and marijuana outside, and they gave him some marijuana in an apple. His head began to throb and he felt tingly and hyper. He ran inside.

Concha told the deputies he went to the bedroom to be with M.C., but she was asleep. He headed for the bathroom, and grabbed H.H. as she walked by. He picked her up, put her on the bathroom counter, and removed her underpants. Then "I took out my penis and—and I was rubbing it … well, on her privates," he said. Afterward he went outside and sat down, and did not remember anything until the next day.

The deputies asked detailed followup questions. Concha said he did not think he ejaculated, but later said he thought he did in response to a leading question. "[I]n all the

times, there was no penetration," he said. They asked if, while he was rubbing his penis on her, it could have penetrated a small amount. "Maybe just the tip?" they asked. Concha said, "No, not once did I try to—to penetrate."

The deputies asked Concha about an earlier incident, in the first house, and he described it. He went into the bedroom and M.C., H.H., and K.H. were all sleeping on the bed. H.H. was wearing only a pull-up diaper. He pushed the crotch of the diaper to one side, and, as in the other incident, got his penis out of his pants and rubbed it on her vulva. He said H.H. woke up when he ejaculated, but later in the interview said he did not ejaculate on that occasion.

Concha said incidents like these two happened five or six times that he could remember, over a two-year period beginning when H.H. was four years old, but he conceded that because he engaged in this behavior while drunk, there could be other incidents he did not remember.

The deputies again pressed Concha on the question of penetration. He equivocated, insisting there was none but also saying he did not remember. He "understood that penetration was to put it all the way in." He specified that he rubbed his penis down the middle of H.H.'s vulva. He rubbed one hand up and down on the middle of his other hand to illustrate, according to the testimony of one of the deputies.

The deputies asked if there was any oral copulation: "Did you use your mouth on her vagina?" Concha answered, "Uh, that yes, I did that." He thought it happened two times. "I mean, I would just suck on her, but not a lot," he said. H.H. was awake when this happened.

Concha was asked why he did these things. He said H.H. was not his daughter (although she and K.H. called him dad), and when M.C. talked to the father of H.H. and K.H. on the phone, he became jealous and it would get to him. Concha also said that when he got drunk, he wanted to have sex, but M.C. did not want to have sex with him.

At the urging of the deputies, Concha wrote a letter in Spanish, apologizing to H.H. A translation of the letter was admitted into evidence. Concha wrote that he regretted "everything" he did to her. He did not know what he was doing because he drank too much, and he hoped she would forgive him.

B. H.H.'s Statements and Testimony

Deputies interviewed H.H. at the sheriff's substation on July 19, 2015. One of them, Deputy Marisol Earnest, testified at trial. Earnest testified that, before the interview began, H.H. was happy and energetic, and continued to be so while answering questions about her name and grade in school. When Earnest asked her first question about Concha, however, H.H.'s demeanor changed. Earnest said, "[H]er whole body language changed. She put her head down. I remember it was very difficult for me to hear her because her voice was lower than" before the question about Concha. The only information Earnest was able to get from H.H. about Concha was that he was "mean."

Perla Juarez-Davis, a county social worker, testified that she conducted a forensic interview with H.H. on August 3, 2015. A transcript was admitted into evidence. H.H. was six years old at the time of the interview.

In the interview, Juarez-Davis pointed to the crotch of an outline drawing of a person and asked H.H. to say what that part was called on a man and a woman. For a man, H.H. said it was called "coi coi," and for a woman she said it was the part used "[t]o go to the bathroom." H.H. told Juarez-Davis that Concha touched that part of her with his coi coi. Juarez-Davis told H.H. that the part she used to go to the bathroom has an inside and an outside; she asked whether Concha's coi coi touched the outside, the inside, or both. H.H. replied, "Outside and inside." Later in the interview, Juarez-Davis again asked "did his (coi coi) go inside your part or outside?" H.H. answered, "inside." "At any time, have any of your parts touched the (coi coi)?" Juarez-Davis asked subsequently. H.H. said, "Just in this one."

Juarez-Davis asked H.H. if it hurt when Concha did this to her. H.H. said, "When he grabs me and I go to the bathroom, it hurts." At other points in the interview, H.H. referred to the incidents of molestation as being "grabbed" by Concha.

Juarez-Davis asked, "How many times did [Concha] put his (coi coi) in—in your part?" H.H. said, "Many times." She said yes when asked if it was more than five times. Pressed further, H.H. said "I think 100" times.

"Did something come out of the (coi coi) or not?" Juarez-Davis asked H.H. H.H. said yes and Juarez-Davis asked her to describe it. "It almost seems like milk," H.H. replied. This happened on two occasions, she said.

H.H. told Juarez-Davis that after one of the incidents of molestation, Concha said "[f]or me not to tell my mom because then if I told her, he was going to kill me and my mom." She was afraid of him.

H.H. also told Juarez-Davis that she had seen Concha and her mother, M.C., in bed together. One of her brothers opened the bedroom door and she saw Concha on top of her mother. Concha got up to close the door and had no pants or underwear on. M.C. was naked. H.H. said she did not know what they were doing together, but later, when Juarez-Davis asked if Concha did what she described only with her, H.H. answered, "And my mom."

Veronica Drucker, an investigator for the district attorney's office, testified that she interviewed H.H. on November 30, 2015. Drucker asked if H.H. had a good relationship with Concha. H.H. said she did not like him because he was mean. Drucker asked if there were any other reasons why she did not have a good relationship with him. "[S]he stated that he would put it there and pointed at her vagina," Drucker testified. Drucker asked further questions, but H.H. "just said he does to me what he does to my mommy." Otherwise, H.H. repeatedly replied that she did not know, and "she would cover her face and put her face down on her bed and she was very upset." Drucker

interviewed H.H. again on February 3, 2016. This time H.H. indicated that Concha assaulted her four times.

H.H. testified at trial through an interpreter. She testified on March 14, 2016, about seven months after her forensic interview with Juarez-Davis. She was seven years old by that time.

During her testimony, H.H. at first appeared to have forgotten much of the account she gave to Juarez-Davis. She testified that Concha had touched her, and pointed to her genital area when asked where. She said he told her not to tell her mother. But she said she did not know what that place she pointed to was called, did not remember the manner in which Concha touched her or how many times he did so, did not see any part of his body, did not know what a coi coi was, and did not know if she ever told anyone what happened. In response to detailed questions (some of them leading), however, H.H. subsequently affirmed that she remembered telling the interviewer that Concha touched her genitals with his penis four or five times, that it happened the same way each time, that it hurt, that something that looked like milk came out of his penis, that incidents happened in two different houses, and that she told her mother.

On cross-examination, H.H. again appeared able to recall little of the matters she discussed in her prior statements or even during her direct examination. She remembered talking to her mother about the incident with Concha in the bathroom, but she did not remember what she said and could not describe the incident. She did not remember where Concha touched her or how many times, and she did not remember saying something that looked like milk came out of his penis. She remembered talking about a time when she saw Concha lying on top of her mother, but she said they were both dressed and under the sheets.

On redirect, H.H. said yes when asked if she was afraid of Concha and found it hard seeing him in the courtroom. The transcript of her testimony indicates that she had

put her head down and would not look at the questioner. She also said she did not remember saying he put his coi coi outside and inside of her.

C. K.H.'s statements and testimony

Deputy Earnest and another deputy interviewed H.H.'s younger sister, K.H., at the substation on July 19, 2015. Earnest testified that K.H. told her she saw Concha and H.H. in the bathroom, through a hole in the door where the doorknob should have been. Both were naked from the waist down. She saw Concha put his penis (she used the Spanish word *pilin*) in H.H.'s vagina.

Juarez-Davis, the social worker, testified that she conducted a forensic interview with K.H. on August 3, 2015. A transcript was admitted into evidence. K.H. was four years old at the time of the interview.

K.H. told Juarez-Davis that she heard Concha call H.H. into the bathroom. There was a hole in the bathroom door, through which K.H. saw Concha putting H.H. on top of a little table. Then he took both of their clothes off and pulled out his *pilin*. She said he put it "down here." She also said what he did to H.H. was like what he does with her mother.

K.H. told Juarez-Davis that after she saw these things, her mother, M.C., appeared. K.H. told M.C. what she saw. M.C. knocked on the bathroom door and Concha put his pants on quickly. M.C. and Concha argued.

Drucker, the district attorney's investigator, interviewed K.H. on November 30, 2015. She testified that K.H. told her she looked through the open bathroom door, and then the hole in the bathroom door where the doorknob should have been, and saw what happened between Concha and H.H. She saw Concha place H.H. on the bathroom counter, pull her pants down, and pull his own pants down to expose his penis. Eventually Concha closed the door and put a sock in the doorknob hole.

Drucker interviewed K.H. again on February 3, 2016. She told the same story, but added that after her view was blocked, she heard M.C. coming in the front door. She ran to her and told her what Concha was doing. M.C. then went and stopped him.

K.H. testified through an interpreter at trial. The first thing she said, as the oath was being administered, was, "He made love to my sister." Again, when the questioning properly began and she was asked what she saw, she said, "They went to the bathroom and he made love to my sister." Asked to describe this, she said Concha took his pants off; then, asked what she saw, she said, "His [*pilin*] and he put it in here in my sister." H.H. was sitting on the sink. K.H. saw this through a hole in the door where the doorknob belonged. Asked where "in here" was, she pointed to a place between her waist and her crotch.

On cross-examination, defense counsel asked K.H. whether she saw Concha's penis go inside or stay on the outside. K.H. said, "Inside."[2]

Defense counsel also asked some questions on cross-examination about whether Concha's penis was "pointing down" or "pointing up" when she saw it. At first she said down, but when counsel repeated the question in a more specific form—"The [*pilin*] has an end, right? It has [an] end, was the end pointing up or was the end pointing down?—K.H. said it was pointing up, and stuck to that answer after several more repetitions of the question.

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[2] Defense counsel followed this up with the question, "When you saw [Concha's *pilin*] next to [H.H.] where was it?" K.H. indicated a point between her crotch and her knees. Later, defense counsel suggested in a question that K.H. had pointed to her knees when saying where Concha's *pilin* was, but this drew an objection that it misstated the testimony, which was sustained. After this, K.H. testified that when she pointed to the place between her crotch and knees, she was indicating the point to which Concha pulled down his pants.

D. M.C.'s Testimony

M.C. testified at trial through an interpreter. She said that in the period before she found out about the abuse, H.H. had begun wetting the bed often, and saying she wanted M.C. to kick Concha out of the house. Sometimes H.H. cried when asking M.C. to do this. A week before M.C. went to the authorities, K.H. told her that Concha had abused H.H. M.C. did not go to the authorities immediately because H.H. did not want to talk about it and M.C. did not yet believe it was true. Finally, H.H. told M.C. that Concha had touched her. M.C. denied that she had seen Concha with H.H. in the bathroom.

E. Sexual Assault Nurse Examiner

The prosecution also presented the testimony of Sarah Cooper, a sexual assault nurse examiner who examined H.H. on August 3, 2015. The examination she carried out was a "nonacute" examination, i.e., one made after more than five days have passed since the alleged assault. In a nonacute examination, no swabs are taken for DNA evidence, because DNA is not expected to last more than five days. Also, because it was an examination on a child, it was an examination of the external genitalia only, meaning that there was no examination of the vagina with a speculum.

Cooper testified that her findings for H.H.'s examination were negative; there was no evidence of injury or trauma. She said that because this was a nonacute examination, the negative finding was not surprising. Based on statistics from the nursing services firm she worked for and from the California Clinical Forensic Medical Training Center, Cooper asserted that about 95 percent of nonacute examinations have negative findings. She said negative findings resulted from three causes: there was no assault; there was an assault that caused no injury; or there was an assault that caused injuries, but the injuries have healed.

The defense called no witnesses.

The jury found Concha guilty on count 1 (sexual intercourse or sodomy with a child 10 years old or younger) and count 4 (continuous sexual abuse of a child under age

14) and not guilty on count 3 (oral copulation or sexual penetration of a child 10 years old or younger).

On count 1, the court sentenced Concha to 25 years to life, as required by section 288.7, subdivision (a). On count 4, the court imposed the upper term of 16 years, and stayed it pursuant to section 654.

DISCUSSION

I. The Trial Court Did Not Err By Allowing Leading Questions

Concha's first argument on appeal is that the trial court erred by allowing the prosecutor to ask H.H. a number of leading questions. We disagree.

Concha's argument is based on the following portions of the prosecutor's examination of H.H.:

"Q. Do you remember telling someone that you saw [Concha's] coy coy?

"MS. RICHARD: Objection. Vague.

"THE COURT: Overruled.

"THE WITNESS: To a lady.

"BY MS. LEWIS:

"Q. When you spoke to that lady, what did you tell her about seeing [Concha's] coy coy?

"A. I don't remember any more.

"Q. [H.H.], do you remember telling that lady that [Concha] put his coy coy down there where you pointed to me?

"MS. RICHARD: Objection, Your Honor. Improper refreshing recollection.

"THE COURT: Overruled.

"THE WITNESS: Yes.

"BY MS. LEWIS:

"Q. And [H.H.], can you tell me how—do you remember when [Concha] put his coy coy down there, where you pointed to me?

"A. In the room.

"Q. In the room? Is that in the bathroom that you were telling me about?

"MS. RICHARD: Objection. Leading, Your Honor.

"THE COURT: Overruled.

"THE WITNESS: Yes.

"BY MS. LEWIS:

"Q. And what happened when [Concha] put his coy coy down there when you were in the bathroom?

"MS. RICHARD: Objection. Leading, Your Honor.

"THE COURT: Overruled.

"THE WITNESS: I don't remember.

"BY MS LEWIS:

"Q. Do you remember seeing [Concha's] coy coy?

"A. Yes.

"Q. Can you tell me what it looked like, [H.H.]?

"A. I don't know.

"Q. Did you see anything come out of [Concha's] coy coy?

"MS. RICHARD: Objection. Leading. Facts not in evidence.

"THE COURT: Overruled.

"THE WITNESS: Yes.

"BY MS. LEWIS:

"Q. Can you tell me what you saw, [H.H.]?

"A. It was like milk.

"Q. And what happened, [H.H.], when the milk came out of [Concha's] coy coy?

"A. I don't know. I don't remember.

"Q. Did it hurt, [H.H.], when [Concha] put his coy coy down there?

"MS. RICHARD: Objection. Leading. Facts not in evidence.

"THE COURT: Overruled.

"THE WITNESS: Yes.

"BY MS. LEWIS:

"Q. Can you tell me what it felt like, [H.H.]?

"A. I don't know.

"Q. It just hurt?

"A. Yes.

"MS. RICHARD: Objection. Vague. Leading. Facts not in evidence.

"THE COURT: Overruled. [¶] … [¶]

"Q. How long was [Concha's] coy coy down there where you showed me?

"MS. RICHARD: Objection. Leading, Your Honor.

"THE COURT: Overruled.

"MS. RICHARD: Also facts not in evidence.

"THE COURT: Overruled.

"THE WITNESS: Two.

"BY MS. LEWIS:

"Q. Two?

"A. Yes.

"Q. Was it a long time or a short time or medium?

"A. Medium."

A leading question is one "that suggests to the witness the answer that the examining party desires." (Evid. Code, § 764.) In general, a "leading question may not be asked of a witness on direct or redirect examination." (Evid. Code, § 767, subd. (a)(1).) An exception is that the "court may, in the interests of justice permit a leading question to be asked of a child under 10 years of age or a dependent person with a substantial cognitive impairment in a case involving a prosecution under Section 273a, 273d, 288.5, 368, or any of the acts described in Section 11165.1 or 11165.2 of the Penal Code." (Evid. Code, § 767, subd. (b).) The prosecution in this case was under section 288.5, and was of acts described in section 11165.1.

The decision whether to allow leading questions in the direct examination of a child witness under this exception (or any witness under the general exception in Evid.

Code, § 767, subd. (a)) is committed to the sound discretion of the trial court. (*People v. Williams* (2008) 43 Cal.4th 584, 631; *People v. Whitehead* (1957) 148 Cal.App.2d 701, 704.) An example of the abuse of this discretion would be directing the witness where to put her hand when showing where the defendant touched her. (*Whitehead, supra*, at pp. 704-705.)

Concha has not demonstrated that there was any abuse of discretion on this point here. The questions allowed in the colloquy above enabled H.H. to testify about matters as to which she had proved insufficiently articulate or confident to testify about in response to non-leading questions. This is the type of situation for which the exception in Evidence Code section 767, subdivision (b), undoubtedly was designed. Defense counsel's thorough cross-examination, which we will discuss further below, showed the extent to which H.H. could discuss these matters without being led, a factor the jury could consider in determining the weight to assign to the direct testimony.

The conclusion that there was no prejudicial error is bolstered by the fact that, as in *People v. Doxie* (1939) 34 Cal.App.2d 511, 513-514, the child witness's answers to the leading questions were "strongly corroborated by extrajudicial statements made by defendant," as well as by the prior statements made by H.H. and K.H. In light of this corroborating evidence, the principal facts established in the colloquy on which Concha focuses on appeal—that he touched H.H.'s genitals with his penis and ejaculated—were not seriously in doubt.

Concha also argues that the court's allowance of the above leading questions denied him due process of law under the federal Constitution. The rulings being reasonable, however, and Concha having identified no special federal constitutional doctrine limiting a trial court's discretion as to leading questions, we find no fundamental unfairness and no federal constitutional violation.

II. H.H.'S Answers on Cross-Examination Did Not Violate the Confrontation Clause

Concha next contends that when H.H. largely answered that she did not remember or did not know in response to defense counsel's questions on cross-examination, he was denied a genuine opportunity to exercise his rights under the confrontation clause of the Sixth Amendment, and consequently the court should have stricken all of H.H.'s direct testimony. We disagree; the confrontation clause did not entitle Concha to answers that would help him, and the witness's answers did not have the effect of making her unavailable.

Many, but by no means all, of H.H.'s answers on cross-examination were that she did not know or did not remember. Among other things, she said she did not remember what happened during the incident when Concha touched her in the bathroom, what she told her mother about that incident, whether she told the forensic investigator that something like milk came out of Concha's penis, whether she told the forensic investigator how many times Concha touched her, how many times she had told her mother that Concha had touched her, and what she discussed with the deputies at the substation. She did testify about details of the incident when she saw M.C. and Concha in bed together, the fact that she had told her mother about the incident in the bathroom, that her siblings were home at the time of that incident and her mother was not, the fact that she told her mother something about that incident, what she and Concha were wearing that day, that she was six years old when she told her mother about the latest incident, and that her private parts had inside parts and outside parts, among other things.

It has been held repeatedly, in cases where the admissibility of a prior statement was challenged, that a witness's claimed lack of memory on cross-examination at trial does not deprive a defendant of rights under the confrontation clause. (*United States v. Owens* (1988) 484 U.S. 554, 558-560 [confrontation clause did not bar victim's testimony that he previously identified defendant as perpetrator, but no longer

remembered how he knew; "successful cross-examination is not the constitutional guarantee"]; *People v. Clark* (2011) 52 Cal.4th 856, 926-928 [where victim's prior statement made at hospital was admitted into evidence, cross-examination was not vitiated for confrontation clause purposes by victim's inability at trial to remember making statement]; *People v. Perez* (2000) 82 Cal.App.4th 760, 762-763, 765 [no confrontation clause violation where witness who identified defendants to police feared retaliation and testified on cross-examination at trial that she remembered nothing].)

In this case, a young child did better recalling and discussing painful facts when asked leading questions as permitted by the Evidence Code, and did less well when asked non-leading questions about some of the same facts and some other facts. Concha is challenging the admission of H.H.'s testimony on direct examination, not her prior statements as in the cases cited above, but the principle is the same. This situation did not place any greater burden on the defendant's right to cross-examination than when a witness does not remember, or claims not to remember, a prior statement or the facts asserted in it. It was an ordinary instance of a witness professing to be unable to give substantive answers on cross-examination, and it was not unconstitutional.

Concha relies primarily on *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, but that case is distinguishable. In *Giron-Chamul*, the defendant was convicted of sex offenses against his four-year-old daughter. The Court of Appeal reversed, saying the victim's testimony on direct examination should have been stricken, on the ground that the defendant "was denied an opportunity to effectively cross-examine daughter because she did not answer hundreds of questions posed by his trial counsel." (*Id.* at pp. 936, 961, fn. 26.) Placed before cameras to testify from a separate room, the victim was often uncooperative on direct examination, but did give some incriminating testimony. On cross-examination, however, the victim was virtually always uncooperative. She refused to answer questions, said she did not want to talk about what happened, moved her mouth without speaking in response to questions, and repeatedly hid under the table or walked

around the room when asked questions. She gave answers to only a few of defense counsel's questions. (*Id.* at pp. 947-953.) The Appellate Court noted that "a witness's failure to remember, whether real or feigned, generally does not deny the defendant an opportunity for effective cross-examination," and even a refusal to answer defense counsel's questions, resulting in a narrowing of the practical scope of cross-examination, does not violate the confrontation clause if the jury has the opportunity to assess the witness's demeanor and determine whether his or her prior statements or testimony have any credibility. (*Id.* at pp. 965-966.) Nevertheless, in the court's view, there is "a continuum on which the right to an opportunity for effective cross-examination is more likely violated as the number of relevant questions that go unanswered increases." (*Id.* at p. 968.) The court concluded that the victim's conduct was toward the more damaging end of this spectrum and concluded that, in light of this, the admission of her direct testimony violated the confrontation clause. (*Id*. at pp. 968-969.)

This case is not similar. H.H. did not refuse to cooperate or refuse to answer defense counsel's questions. She often answered that she did not know or did not remember, but to a significant number of questions she gave substantive answers. When, with respect to a question she had already answered on direct, she replied that she did not remember or did not know, the impact was merely that the jury was given a means of gauging the reliability of the answers given in response to leading questions on direct.

If, as *Giron-Chamul* postulates, there is a continuum, then this case falls on the portion of the continuum governed by the general rule that a witness's forgetfulness does not deprive a defendant of an opportunity for effective cross-examination as long as the cross-examination gives the jury a chance to study the witness's demeanor and assess his or her credibility. The trial court's failure to strike H.H.'s testimony did not violate the confrontation clause.

III. The Trial Court Did Not Err by Omitting an Instruction on Attempt as a Lesser Included Offense on Count 1

Concha contends that the trial court should, on its own motion, have given a jury instruction on attempted sexual intercourse with a child 10 years old or younger as a lesser offense necessarily included in count 1. He is mistaken.

A trial court is required, with or without a request, to instruct the jury on all necessarily included lesser offenses that find substantial support in the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149, 162.) This rule obligates the court to instruct the jury "on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged." (*Id.* at p. 154.) A trial court is not required to instruct on theories that are not supported by substantial evidence. (*Id.* at p. 162.)

California courts have employed two tests, the elements test and the accusatory pleading test, to identify necessarily included offenses. "[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117.)

It is not the case that for every offense, an attempt to commit that offense is a lesser offense necessarily included in it. This is because an attempt requires a specific intent to carry out the crime in question, while many completed crimes require only a general intent. (*People v. Bailey* (2012) 54 Cal.4th 740, 749, 752-753; *People v. Ngo* (2014) 225 Cal.App.4th 126, 156.)

A violation of section 288.7, subdivision (a), sexual intercourse or sodomy with a child 10 years old or younger, is a general intent crime. "When the definition of a crime consists of only the description of a particular act, without reference to intent to do a

further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent." (*People v. Hood* (1969) 1 Cal.3d 444, 456-457.) Like the crimes of rape and sodomy (*People v. Richardson* (2008) 43 Cal.4th 959, 1018), sexual intercourse or sodomy with a child 10 years old or less requires only a general intent. (*People v. Mendoza* (2015) 240 Cal.App.4th 72, 83 (*Mendoza*).) An attempt to commit that offense, by contrast, requires that the defendant specifically intend that his action will result in commission of the offense. (*Ibid.*)

Because attempted sexual intercourse or sodomy with a child has an element the completed crime does not have—specific intent to commit that offense—the former is not a lesser offense necessarily included in the latter under the elements test. Because the facts actually alleged in the information also do not include that extra element, the attempt here also is not a lesser offense included in the completed offense under the accusatory pleading test.

Consequently, the trial court was not obligated to give an attempt instruction on its own motion.

IV. There Was No Prejudicial Error in the Court's Rulings on Hearsay Objections

For some of the items of testimony listed below, defense counsel made hearsay objections and the trial court overruled them, ruling that the testimony was not to be considered as evidence of the truth of the matter stated, but only to explain the subsequent conduct of the witness. For other items, defense counsel did not explicitly object on hearsay grounds, but the court still considered the issue and made the same ruling.

- M.C.'s testimony that H.H. asked her to tell Concha to leave.
- M.C.'s testimony that K.H. said Concha did something to H.H.
- M.C.'s testimony that K.H. said Concha abused H.H.

- Juarez-Davis's testimony that Deputy Anderson gave her a general description of the allegations against Concha.
- Deputy Anderson's testimony that he read a report stating that the case involved allegations of sexual abuse by Concha against H.H.
- Nurse Cooper's testimony that Deputy Anderson gave her certain details about what was alleged in the case: H.H. or M.C. said Concha penetrated H.H. and ejaculated; H.H. was six years old; the last incident might have happened on July 19, 2015; and someone said the abuse happened over 100 times.

Concha now argues that each ruling was erroneous because the witness's subsequent conduct was not relevant to any issue in the case, and the testimony should have been excluded. He further argues that the testimony that ultimately derived from a report read by Deputy Anderson was testimonial hearsay and its introduction violated his rights under the confrontation clause of the Sixth Amendment.

We need not decide whether any of these rulings were erroneous because there is no likelihood that Concha would have obtained a better result had all the testimony been excluded. The record thus rules out *prejudicial* error regardless of whether the harmless-error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), or *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), is applied.

Each of the first five items above tended to show that Concha sexually abused H.H. or was accused of sexually abusing H.H. In light of Concha's confession, these items were inconsequential. There was no claim that the confession was coerced. With respect to the fundamental fact that he abused H.H., Concha scarcely even needed prompting during his police interview. He simply began describing the latest incident. There was never any serious dispute over whether he sexually abused her.

The last item of testimony is only slightly more complex. Concha's confession included statements that he ejaculated during at least one of the incidents, so Cooper's testimony that she was told he was accused of this was unimportant. He denied that there was penetration as far as he could remember, however, and admitted he remembered four

or five incidents, not 100, so his confession did not render those points in Cooper's testimony harmless. Yet all Cooper learned from Anderson, and all she testified to, was that these were claims that had been made by someone against Concha. By the time Cooper testified, the jury was already aware that these claims had been made, having heard H.H.'s testimony and seen the transcript of her forensic interview.

Finally, it is important that several times, the trial court admonished the jury that the testimony was to be considered only insofar as it explained the witness's subsequent conduct, not for the truth of the matter asserted. We assume jurors follow the trial court's instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) Even if the court erred in admitting the testimony because the witness's subsequent conduct was irrelevant, we assume the jury still followed the instruction to consider the testimony only in that connection and not for the truth of the matter asserted.

For these reasons, any error in the admission of this testimony was harmless under any standard.

V. Prosecutor's Misstatements About Penetration in Closing Argument Were Not Prejudicial Misconduct

Concha argues that some of the prosecutor's statements during closing argument about the definition of penetration for purposes of count 1 constituted prejudicial misconduct. They did not.

"Sexual intercourse" within the meaning of section 288.7, subdivision (a), as charged in count 1, "means any penetration, no matter how slight, of the vagina or genitalia by the penis." (*Mendoza, supra,* 240 Cal.App.4th at p. 79.) In other words, slight penetration of the labia majora, the outermost portion of the external genitalia, is sufficient to establish this element of the offense.

The prosecutor's discussion of this requirement in closing argument was as follows:

"So now what we need to decide is what is an act of sexual intercourse according to the law. And the reason I say 'according to the law' is because it can be contrary to what your common understanding is. The law is very specific. So we need to talk about what the law says is sexual intercourse.

"Sexual intercourse is defined by the law as any sexual penetration, however slight, okay, of the vagina or the genitalia by the penis. So basically what does that mean? That means you have to use your penis. It has to be some sort of penetration, however slight, and it can be of the vagina and also the genitalia.

"So if you will recall when we had Sarah Cooper on the stand, she did the nice diagram for you. It was Diagram G. And she labeled it with all the different parts. So if anyone was wondering why we were having an anatomy lesson, this is the reason. Because the law is very specific as to what sexual intercourse and what sexual penetration mean.

"Okay. What did she tell us? She told us that the female genitalia has both the external and the internal parts. She described some of those for you, and she diagrammed that for you on what she showed as Diagram G. So she told us about the mons pubis, the labia majora, the labia minora, and the clitoris. Those [are] the major ones she described. There were also some other ones she specified, but those are the major ones for your purposes that will be important. She also described the internal genitalia that's inside the female genitalia as the vagina and the cervix. Okay?

"So what the law is saying is that a slight penetration of either of those, the external or internal genitalia, that can constitute sexual intercourse. Okay? So that's why it was important to remember that.

"Also penetration. Okay? So penetration means to pass, to extend, or to pierce into something. Okay. And the law says that it can be however slight. And what that means is the defendant did not have to insert his penis all the way into [H.H.'s] vagina for him to have committed this crime. That's why it's important. The law says that any slight penetration of her internal [*sic*] genitalia. So he could have tried to insert his penis into her vagina. That's enough to violate this law.

"MS. RICHARD: Objection, your Honor.

"THE COURT: Legal basis?

"MS. RICHARD: A try would be equivalent to—

"THE COURT: Well, let's have a sidebar.

"(A sidebar is held, not reported.)

"THE COURT: The objection is overruled.

"Thank you, Ms. Lewis.

"MS. LEWIS: Thank you, your Honor.

"And so the Judge has given you the law. What I have put on the slides comes directly from the jury instructions. You will have them in the back so you can reference them yourself. Okay?

"But what the law says is that he does not have to fully insert his penis into her vagina. He doesn't have to fully penetrate the external genitalia. It says it only has to be slight, very slight. That's what the law says. And it's enough to violate this Penal Code section, which is why it was important to go over the external and the internal genitalia of the female.

"This slide is just talking about the internal genitalia which we already know about.

"So let's talk about the facts in the case and what we know. Okay. So we know that [H.H.] told people about what happened, and she also testified here that the defendant put his 'coy-coy' inside and outside. Okay? And, yes, [H.H.] is very young. She was seven years old when she came and testified in front of you. And she was even younger, we know, when this incident … happened. But she knew enough about her genitalia to tell you that it was both inside and outside. Right?

"So she is saying he used his 'coy-coy' both on her inside, referring to her vagina. Whether that was a full penetration we don't know—right?—because the SART exam has no findings. And [H.H.] wasn't able to clearly articulate to us, but she was able to say that it caused her pain. We also know that she said that he also used his 'coy-coy' on the outside, referring to her external genitalia. Okay. We know that she said that that caused her pain. We know that the defendant was rubbing against it enough for him to reach orgasm, and we also know from his confession how he rubbed his penis against her external genitalia. Right?

"And what did he say when he was asked by the detectives and they asked how were you rubbing it, you know, asking him questions to try to figure out what happened. He says that he was rubbing it straight up and

down her genitalia. Well, what is that? What is straight up and down the female genitalia? We know from listening to Ms. Cooper's testimony that that is the labia majora and the labia minora. Right? It's enough to penetrate her external genitalia, which is enough to violate Count 1. Okay. And we know that's what happened in the case.

"So rubbing an erect penis. And how did we know it's erect? We know for a couple of reasons why. We know because [K.H.] told us. She was asked if the defendant's penis was up or down. She said it was up. Okay. That's a five-year-old's interpretation of an erect male penis. That's what she saw when she looked into the bathroom. We know it was up because we know the defendant climaxed after he was sexually abusing [H.H.] in the bathroom.

"So, according to the law, rubbing an erect penis down the center, up and down, okay, with enough friction to cause him to orgasm, enough friction to cause her pain, that is enough for sexual penetration according to the law and enough for a violation of—

"MS. RICHARD: Objection. Misstates the law.

"THE COURT: Once again, I will admonish the jury that what the attorneys are saying in their closing arguments is not the evidence nor is it the law. You will follow the law as I have given it to you. So if at any time you believe that the attorneys are either misstating the evidence or the law, you will disregard it and follow the law as I have given it to you and base your decision on the evidence that's been presented. [¶] Continue, please.

"MS. LEWIS: Thank you, your Honor.

"And, again, you will have the jury instructions in the back, and you have heard the testimony. And you also have your common sense. And rubbing an erect penis up and down the external genitalia of a young child, okay, would cause slight penetration. And you can make that determination."

Concha argues that the prosecutor misstated the law at the two points when defense counsel objected. At the first point, the prosecutor said: "So he could have tried to insert his penis into her vagina. That's enough to violate this law." At the second point, she said: "So, according to the law, rubbing an erect penis down the center, up and down, okay, with enough friction to cause him to orgasm, enough friction to cause her

pain, that is enough for sexual penetration according to the law and enough for a violation of—" Concha argues that these remarks were wrong and constituted prosecutorial misconduct.

"Under the federal Constitution, to be reversible, a prosecutor's improper comments must '"so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process."' [Citations.] '"[On the other hand] conduct by a prosecutor that does not render a criminal trial fundamentally unfair is [still] prosecutorial misconduct under state law … if it involves '"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."""""" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000.) "When, as in the present case, the claim is based upon 'comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*Id.* at p. 1001.) Despite the usual formulation of the state-law standard in terms of deceptive or reprehensible methods, the prosecutor's behavior need not be in bad faith in order to constitute reversible error; the impact on the defendant can be just as prejudicial if the conduct is inadvertent. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214 (*Bolton*).) For this reason, it has been said that "prosecutorial error" would be a better name for the doctrine. (*People v. Hill* (1998) 17 Cal.4th 800, 822, fn. 1 (*Hill*).) It is improper, of course, for a prosecutor to misstate the law (*People v. Bell* (1989) 49 Cal.3d 502, 538), but not necessarily reversible error. We analyze the challenged statements not in isolation but as part of the prosecutor's argument as a whole. (*People v. Cole* (2004) 33 Cal.4th 1159, 1203.)

If the prosecutor's error was one of state law, it is reversible if prejudicial under the standard of *Watson, supra,* 46 Cal.2d at page 836 (reversal warranted only if there would be a reasonable probability of a better outcome for the defendant absent the error), while an error of federal constitutional magnitude is tested under the standard of

Chapman, supra, 386 U.S. at page 24 (affirmance warranted only if error is harmless beyond a reasonable doubt).

Concha is correct about the first challenged statement: "So he could have tried to insert his penis into her vagina. That's enough to violate this law." This does literally misstate the law. A perpetrator could conceivably *try* to insert his penis in a victim's vagina and nevertheless fail even to insert it slightly into the external genitalia, and consequently not effect penetration as defined. The second statement is at least inartful: "So, according to the law, rubbing an erect penis down the center, up and down, okay, with enough friction to cause him to orgasm, enough friction to cause her pain, that is enough for sexual penetration according to the law and enough for a violation of—" Such facts certainly could support an inference that penetration at least of the external genitalia took place, but they do not do so as a matter of law, as the prosecutor's phrasing could be taken to suggest. A more precise argument would have been: "You heard the defendant confess that he rubbed his penis up and down along the middle of H.H.'s genitalia until he ejaculated. You heard H.H. confirm that he ejaculated, and you heard her testify that his penis hurt her. You heard K.H. testify that his penis was erect. I submit to you that it would be virtually impossible as a practical matter for a man to rub his erect penis up and down the center line of a girl's vulva hard enough to hurt her and long enough to cause him to ejaculate without at least slight penetration of the labia majora. On that basis, you should infer, beyond a reasonable doubt, that penetration occurred."

We believe, however, that the argument counsel actually made, taken as a whole, communicated the essence of this. In light of the evidence, counsel's otherwise correct discussion of the issue, and the court's admonition to follow the jury instructions, not counsel's assertions, we do not think it reasonably probable that the jury misunderstood or misapplied the law and found (for instance) that there was penetration because Concha was attempting to put his penis in H.H.'s vagina although he failed even to penetrate

slightly the external genitalia; or because it thought the rubbing constituted penetration as a matter of law. Thus, there was no reversible state law error.

As for federal constitutional error, we conclude there was none. In light of the above discussion, we cannot conclude that Concha's trial was fundamentally unfair because of these defects in the prosecutor's closing argument.

VI. Prosecutor Did Not Vouch For or Testify About Witnesses During Closing Argument

Concha contends that some of the prosecutor's remarks about H.H. and K.H. during closing argument constituted prosecutorial misconduct in the form of vouching for, and giving opinion testimony about, prosecution witnesses. He is mistaken.

The prosecutor argued as follows regarding the demeanor of H.H. and K.H. while they testified:

> "And one thing I would submit to you is if we were going to meet with the girls, right, and there's an insinuation that we meet with them to determine what they are going to testify to or how they should testify, wouldn't it make sense to you that we would tell the witnesses don't you think you should look up at the jurors while you speak? Don't you think you should keep your voice up? Don't you think you should turn your chair towards them?
>
> "If you noticed, neither of the girls did that during their testimony. Their behavior was very authentic. It was the reaction that they had to the courtroom and also to the nature of the things we were discussing, which is something that you can take into consideration when you are determining whether or not you should believe their testimony. And I submit that you should because it came from an authentic place. It came from a fear, putting the head down, not wanting to discuss it. So it really came from an authentic place."

Concha's argument now is that the description of this behavior as authentic and based on fear "was misconduct, inasmuch as the prosecutor was vouching for [her] complaining witnesses' credibility, and was offering what amounted to body language interpretation testimony without any supporting evidence in the record."

We begin with the claim that the prosecutor vouched for the witnesses' credibility. Vouching occurs when a prosecutor offers an opinion on the credibility of a witness based on his or her own "experience or on other facts outside the record." (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207; see also, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 200; *People v. Williams* (1997) 16 Cal.4th 153, 257.) The danger arising from vouching is that the improper "prosecutorial comments may be understood by jurors to permit them to avoid independently assessing witness credibility and to rely on the government's view of the evidence." (*People v. Cook* (2006) 39 Cal.4th 566, 593.)

The prosecutor's comments about the authenticity of H.H. and K.H.'s behavior are not an example of vouching. "Closing argument presents a legitimate opportunity to 'argue all reasonable inferences from evidence in the record.'" (*Bolton, supra,* 23 Cal.3d at p. 212.) Jurors are routinely instructed that they may draw inferences about witnesses' credibility from their demeanor. The jury was so instructed in this case. The prosecutor's argument here did no more than urge the jurors to infer from the girls' apparent discomfort and anxiety that they had been brought to court to recall traumatic events, not to press false accusations. (Could defense counsel have urged the opposite inference—they were uncomfortable because they were lying? No doubt.) There was no reliance on the prosecutor's own experience or any facts outside the record.

Concha's notion that the prosecutor was taking on the role of an expert witness by urging the jurors to make an inference of credibility from the witnesses' demeanor also rests on the concept of reliance on facts outside the record. Our Supreme Court has stated:

> "We have explained that [a prosecutor's reference in closing argument to facts not in evidence] is 'clearly ... misconduct' [citation], because such statements 'tend[] to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence."

> [Citations.]' [Citations.] 'Statements of supposed facts not in evidence ... are a highly prejudicial form of misconduct, and a frequent basis for reversal.'" (*Hill, supra*, 17 Cal.4th at pp. 827-828.)

Concha has misapplied this concept, however. The prosecutor's argument was an appeal to the jurors' common sense, not to any supposed expertise of the prosecutor in what Concha calls "body language interpretation." "The permissible scope of closing argument is broad, and the prosecutor's recommendation that the jury should use its common sense when [evaluating the evidence] fell well within the boundaries of permissible argument." (*People v. Richardson* (2008) 43 Cal.4th 959, 1017-1018.)

VII. The Court Did Not Err in Allowing Expert Testimony Based in Part on Hearsay, and the Witness Was Not Unqualified

Sarah Cooper, the sexual assault nurse examiner, testified that she was not surprised that H.H.'s examination resulted in no positive findings because, according to statistics with which she became familiar in the course of her work, 95 percent of nonacute examinations result in no positive findings. Concha contends that the statistics were based on testimonial hearsay and thus under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) could not properly form the basis of an expert opinion. He also asserts that Cooper was not qualified to render the opinion. These contentions lack merit.

"Testimonial" hearsay statements include statements recorded in police reports and preliminary hearing transcripts, and other statements made primarily to memorialize facts relating to past criminal activity—including reports of scientific test results from crime labs and the like—which if introduced at trial function in the same way live, in-court testimony functions on direct examination. (*Sanchez, supra*, 63 Cal.4th at pp. 685, 687, 690.) Applying *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), *Sanchez* explains that if an expert witness relies on or relates the contents of such statements, and they pertain to facts specific to the case, then the defendant's rights under the confrontation clause are violated. (*Sanchez, supra*, at p. 686.)

Concha's argument appears to be that Cooper should not have been allowed to testify that 95 percent of nonacute examinations result in no positive findings because the underlying information—reports of examinations ordered for the purpose of prosecuting crimes—was testimonial hearsay. The flaw in this argument, as we will explain, lies in the fact that what Cooper testified to in informing the jury of this statistic was *general background information* belonging to her field of expertise, rather than *case-specific facts*.

The specific problem the California Supreme Court confronted in *Sanchez* was the impact of *Crawford* on California's practice of allowing police gang experts to recite and rely on hearsay information derived from police reports and the like to prove the elements of a gang enhancement or gang offense under section 186.22. (*Sanchez, supra,* 63 Cal.4th at p. 670.) *Crawford* held that, under the confrontation clause, out-of-court testimonial statements could not be introduced against a defendant if offered for a hearsay purpose. (*Sanchez, supra,* at p. 680.) Before *Sanchez*, California courts had avoided the effect of *Crawford* on testimonial hearsay as a *basis for expert testimony* by holding that such hearsay was admitted only to allow the jury to evaluate the expert's opinion, not for the truth of the matter asserted. *Sanchez* concluded that that approach was untenable where the expert related and relied on case-specific hearsay, meaning hearsay concerning the facts and people involved in the case being tried. It was untenable because the jury naturally has to decide for itself whether such hearsay statements are true before it can determine the value of an expert's opinion based on them. Consequently, under the federal Constitution, expert basis testimony of this kind—the kind asserting case-specific facts based on testimonial hearsay—can now neither be related to the jury by an expert nor used by an expert as the foundation of an opinion. (*Sanchez, supra,* at pp. 679, 684-685.) In fact, such expert testimony is inadmissible under state law if it does not fall within a hearsay exception, even if the hearsay is *not* testimonial. (*Id.* at p. 686.)

But *Sanchez* held that this change in approach applied *only* to case-specific hearsay. An expert's general background knowledge is not subject to the new *Crawford*-based confrontation clause stricture because it can still properly be regarded as not being offered for a hearsay purpose. The same reasoning applies under state hearsay law. (*Sanchez, supra,* 63 Cal.4th at pp. 681, 685.)

This distinction is based on the notion that an expert's general background knowledge is accepted because it is part of the expert's expertise, which the law allows jurors to rely on even though they do not possess it themselves—they proceed as if it is valid without any independent knowledge that it is. "[A]n expert's background knowledge and experience is what distinguishes him from a lay witness, and … testimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth." (*Sanchez, supra,* 63 Cal.4th at p. 685.) But there is no such thing as an expert in the particular facts of a specific case. The jury must determine for itself whether purported case-specific facts are true before it can assess the value of an opinion based on them, so those facts cannot be presented to the jury through the expert's hearsay testimony alone.

In summary, an expert's general background knowledge may be related and relied upon by an expert to support his or her opinion without violating the confrontation clause or state evidence law, even if that background knowledge is grounded in out-of-court testimonial sources, because an expert's general background knowledge has never been excluded as hearsay even though offered for its truth, and thus implicates neither the hearsay rule nor the confrontation clause in the first place.

Despite Concha's argument to the contrary, Cooper's testimony about the statistics from her firm and other sources known to those in the field clearly was not case-specific. "Case-specific" hearsay as defined in *Sanchez* is a simple concept. It just means hearsay regarding the facts and people involved in the case. (*Sanchez, supra,* 63 Cal.4th at p. 676.) The examinations on which that 95 percent statistic is based have nothing to do

with the facts or people involved in this case. Consequently, those examinations and that statistic are part of the general background information Cooper brought to bear as part of her expertise. It follows that her testimony about them is not to be treated as hearsay, and did not violate the hearsay rule or the confrontation clause.

Concha also appears to argue that the 95 percent statistic was irrelevant because it referred to 95 percent of cases in which a nonacute examination was performed, not 95 percent of nonacute examination cases in which multiple instances of penetration of a child's genitalia by an adult's penis were alleged, so it is not a meaningful measure of the likelihood that such assaults could occur and leave no trace. Concha made no relevance objection on this point at trial, however, so the issue is forfeited.

Finally, Concha says Cooper was not qualified to render the opinion. Evidence Code section 720, subdivision (a), provides:

> "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert."

We review the trial court's decision on qualifying an expert under the abuse of discretion standard. (*People v. Jones* (2012) 54 Cal.4th 1, 57.)

Cooper testified that she was a registered nurse with a bachelor's degree in nursing and a certification in sexual assault nurse examinations. She had been a forensic nurse since 2005. She was currently working as an independent contractor with a firm called Forensic Nurse Specialists of Central California, which had a contract to respond to law enforcement calls for forensic medical examinations. Previously, she worked as a sexual assault nurse examiner in the emergency room and the pediatric facility at Bakersfield Memorial Hospital. She performed forensic examinations on both adults and children, and had done about 75 forensic examinations on children at the time of her testimony.

In connection with her qualification specifically to testify to the 95 percent statistic, Cooper testified that she had knowledge from personal experience and also was familiar with research on the topic. Personally, in addition to the 75 examinations she had performed on children alone, she reviewed every case handled by her firm and had done case studies with doctors and nurses throughout the state. She also had reviewed statistics from California Clinical Forensic Medical Training Center, the statutory training authority (§ 13823.93) for sexual assault forensic examiners.

We perceive no abuse of discretion in the court's ruling that Cooper was qualified to testify as an expert on each of the topics about which she testified.

VIII. The Conviction on Count 4 Must Be Reversed as Legally Inconsistent with the Conviction on Count 1

Count 4 charged continuous sexual abuse of a child (§ 288.5, subd. (a)) between January 18, 2013 (H.H.'s fourth birthday), and July 18, 2015 (the date the abuse was reported) and count 1 charged sexual intercourse with a child (§ 288.7, subd. (a)) during the same time period. The two offenses were not charged in the alternative. The statute defining the offense of continuous sexual abuse of a child forbids charging in this manner:

> "No other act of substantial sexual conduct, as defined in subdivision (b) of Section 1203.066, with a child under 14 years of age at the time of the commission of the offenses, or lewd and lascivious acts, as defined in Section 288, involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative." (§ 288.5, subd. (c).)

People v. Johnson (2002) 28 Cal.4th 240, 248, held that multiple convictions arising from such a pleading are inconsistent with the statute and a conviction or convictions must be reversed to render the result consistent with it. The same is necessary in this case.

Addressing the question of which convictions to reverse and which to affirm in a situation like this, the appellate court in *People v. Torres* (2002) 102 Cal.App.4th 1053, 1059, concluded that it must "leave appellant standing convicted of the alternative offenses most commensurate with his culpability," by which it meant those with the longer sentences. It reversed the conviction of continuous abuse and affirmed convictions of multiple offenses occurring during the period of the continuous abuse. (*Id.* at pp. 1059-1060.)

Applying this approach, we reverse the conviction of continuous sexual abuse of a child (for which the upper term of 16 years was imposed and stayed) and affirm the conviction for sexual intercourse with a child (carrying a term of 25 years to life).

Concha argues that we should reverse the conviction on count 1 instead "in light of the many deficiencies with that charge." There is no authority for that approach, and in any event, we have not found the deficiencies for which Concha contends.

The People argue that under *People v. Goldman* (2014) 225 Cal.App.4th 950, 955-957, Concha forfeited this issue because he did not demur to the information. In *Goldman*, as here, the information erroneously failed to state that the continuous abuse and a sex offense occurring in the same time frame were charged in the alternative. There, however, the proof was such that the individual acts of abuse could have been charged as occurring outside the period of the continuous abuse, and the pleading could have been corrected in that way had the defendant demurred. (*Id.* at p. 958.)

The People offer no explanation of how an amendment of the information according to which the section 288.7 violation took place outside the time frame of the section 288.5 violation would have been consistent with the proof in this case. Concha's testimony indicated that all of the abuse took place between H.H.'s fourth birthday and the date the abuse was reported, and the evidence suggested that one of the two specific incidents he described took place just before that final date and the other some time earlier. There was evidence that an indeterminate number of additional acts—at least two

or three—took place at unspecified times. On this state of evidence, how could the information have been reframed to capture the three acts required for continuous sexual abuse (§ 288.5, subd. (a)) within a stated period while being sure to leave an act of sexual intercourse outside that period?

In light of the above considerations, even assuming *Goldman* was correctly decided, we do not think Concha can be held to have forfeited this issue, for we do not see how anything could have been done to avoid two legally inconsistent convictions and the resulting unauthorized sentence. And even if he did forfeit it, we would exercise our discretion to address the forfeited issue and remedy the inconsistency.

DISPOSITION

The conviction on count 4 is reversed and the sentence on that count is vacated. The balance of the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and forward it to the appropriate correctional authorities.

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SMITH, J.

WE CONCUR:

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PEÑA, Acting P.J.

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DESANTOS, J.